

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

In the Matter of:)
DAVID McATEE,)
)
Deceased.)
_____)
CHERYL ANN STEVENS-McATEE,)
)
Claimant,)
)
v.)
)
POTLATCH CORPORATION,)
)
Employer,)
)
and)
)
WORKERS COMPENSATION EXCHANGE,)
)
Surety,)
Defendants.)
_____)

IC 2004-003559

**ORDER AWARDING
ATTORNEY FEES**

Filed August 12, 2008

On June 18, 2008, the Commission found, as directed by the Idaho Supreme Court, that Claimant is entitled to attorney fees from Defendants pursuant to Idaho Code § 72-804 for Defendants' unreasonableness in denying David McAtee's claim. Claimant filed a brief, memorandum, and affidavit in support of attorney fees, costs, and benefits. Defendants filed an objection on July 25, 2008. Claimant declined to file a reply.

Claimant requests an award of attorney fees computed on an hourly basis as well as costs, totaling \$74,931.93. Claimant avers that an hourly calculation is the only reasonable award which will punish Defendants for the unreasonable denial of McAtee's claim. In the alternative,

Claimant argues that if an award is contingent upon Claimant's benefits, the Commission should calculate the benefits McAtee would have received had he lived to enjoy the benefits awarded.

Defendants argue that if Claimant's fee agreement comports with the Idaho Industrial Commission's rules, attorney fees should be a 30% contingent fee of whatever benefits Claimant receives. Defendants contend that the expenditure of over 200 hours is entirely unreasonable.

The Commission will begin by noting that Idaho Code § 72-804 allows the Commission to make an award of reasonable attorney fees but it does not convey the authority to assess costs. Additionally, the Idaho Supreme Court has held that "an award of attorney fees in a worker's compensation case must be deemed compensation to the injured employee and not as a penalty against the employer or surety." Dennis v. School Dist., 135 Idaho 94, 98, 15 P.3d 329, 333 (2000).

Idaho Code § 72-804 provides that if an employer contested a claim without reasonable ground, or neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In assessing what a reasonable fee would be under the circumstances, the Commission is guided by the attorney client fee agreement as an indication of the parties' intentions. Clark v. Sage, 102 Idaho 261, 264, 629 P.2d 657, 660 (1981). Yet in determining reasonable attorney fees the Commission is also obligated to consider several factors.

In Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 990 (1984), the Court listed the factors the Commission is to consider in awarding attorney fees under Idaho Code § 72-804.

The factors include but are not limited to:

- (1) the anticipated time and labor required to perform the legal services properly;
- (2) the novelty and difficulty of the legal issues involved in the matter; (3) the

fees customarily charged for similar legal services; (4) the possible total recovery if successful; (5) the time limitations imposed by the client or circumstances of the case; (6) the nature and length of the attorney-client relationship; (7) the experience, skill and reputation of the attorney; (8) the ability of the client to pay for the legal services to be rendered; and (9) the risk of no recovery.

Hogaboom v. Economy Mattress, 107 Idaho at 15, 684 P.2d at 992 (quoting Clark v. Sage, 102 Idaho 261, 265-66, 629 P.2d 657 (1981)).

The Commission begins by reviewing Claimant's attorney client fee agreement. The affidavit from Claimant's attorney includes several exhibits pertinent to the attorney fee discussion. Exhibit E is a hand written note dated 5-11-04 stating "25% cont. fee unless hearing starts, then 30% plus out of pocket & case expenses." Exhibit F is a disclosure statement signed by David McAtee on August 9, 2006. Exhibit G includes a disclosure statement signed by Cheryl McAtee on February 21, 2008 and an addendum to contingency fee agreement signed by Cheryl McAtee and dated September 1, 2007.¹

There is no mention of an hourly fee within the documents signed by David McAtee. The only mention of an hourly fee is in the addendum signed by Cheryl McAtee on September 1, 2007. The addendum allowed for a variety of payment options depending on the outcome of the case before the Supreme Court. Only one possible outcome resulted in the payment of attorney fees based on an hourly rate. Claimant's counsel would receive his hourly rate if Claimant was successful on appeal, was awarded attorney fees, and the hourly method of payment was greater than 30% of the benefits awarded. As we now know, that scenario has come to fruition.

Claimant's case was heard at the Commission level, was appealed to the Idaho Supreme Court, and is now on remand. There are also additional reserved issues because Claimant's original case was bifurcated. Claimant's case took considerable time and labor over the four years

¹ David McAtee died in an unrelated accident while his appeal was pending before the Idaho Supreme Court. David McAtee's mother and personal representative, Cheryl McAtee, was substituted in his place in this action.

of representation, but Claimant has previously been awarded attorney fees on appeal by the Supreme Court. Claimant's attorney did spend a good deal of time on this case, but the central issue of credibility is not novel or complex. The fees customarily charged for similar legal services are 30% of Claimant's compensation. The fee agreement contemplated and signed at the outset of the attorney client relationship only provided for a contingent fee recovery.

Having reviewed the totality of the circumstances, the fee agreement entered into by David McAtee and Cheryl McAtee with Claimant's attorney, and the Hogaboom factors, the Commission finds that a reasonable award of attorney fees is 30% of Claimant's benefits including but not limited to TTDs and medical care.

Claimant's memorandum also includes a detailed request for TTD benefits and medical care benefits in the amount of \$78,475.19. Defendants did not respond to the amount as set forth by Claimant. As noted above, the Commission finds Claimant is entitled to attorney fees of 30% of Claimant's compensation, which currently equals \$23,542.56 (\$78,475.19 x .30).

IT IS SO ORDERED.

DATED this _12th day of ____August____ 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this _12th_ day of __August____2008, a true and correct copy of the foregoing **ORDER AWARDING ATTORNEY FEES** was served by regular United States Mail upon each of the following:

NED A CANNON
508 8th STREET
LEWISTON ID 83501

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501-0446

sb/cjh

_____/s/_____